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Conflict of Laws—Domicile Rule in Custody Proceedings

While the whole field of custody of the children seems to be confused, that area of the problem which crosses into the domain of Conflict of Laws is an entangled mass of inconsistent awards, decrees, and orders.[1] This lack of uniformity has given rise to abuses of custody orders which not only go unreproved, but far too often result in advantage to the recalcitrant. The most prevalent of such violations are withholding of a child against the wishes of his custodian and abducting of a child from the custodian by a parent or relative. How and why such conduct is resorted to and often rendered advantageous in subsequent custody actions can best be understood by considering the jurisdictional aspects of such actions.

This subject presented no problem to the early common law for in that system a father had absolute authority over his family. In America, however, the state stands in the relation of *parens patriae* to its children. In this capacity the sovereign's right is superior to that of the child's parents, and this authority has as its natural corollary a duty to attend the welfare and best interests of its minors. An incident of this obligation is the determination of custody of those children whose parents are separated, divorced, deceased, or who by some unsocial conduct have lost the right to their child. While legislatures enact some child welfare regulations, the individual nature of the responsibility renders the ultimate resolution a matter for judicial discretion. Though broad range is essential in the matter of deciding the specific issues, as in all judicious actions some jurisdictional bounds must be defined.

A court determination of custody, being an adjucation of the domestic status of the child is considered to be an in rem proceeding.[2] Following the general rule of in rem proceedings as it is applied to property and divorce actions, the res must be within the territorial dominion of the court for jurisdiction to attach. Thus, in divorce actions, the res is said to be the marital status, and in most states one or both of the parties to the suit must be domiciled in the forum in order to bring the res into the state.[3] In a custody action, the child is considered the res,[4] but the action differs from other in rem proceedings in that the foremost purpose must be the determination of what course is

[1] See Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42, 59 (1940).

[2] Coble v. Coble, 229 N. C. 81, 84, 47 S. E. 2d 798, 800 (1948) (dictum); Goodrich, *Custody of Children in Divorce Suits,* 7 CORNELL L. Q. 1 (1921). *But see* Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42, 56 (1940).

[3] GOODRICH, CONFLICT OF LAWS § 132 (3d ed. 1949).

[4] Coble v. Coble, 229 N. C. 81, 84, 47 S. E. 2d 798, 800 (1948) (dictum).

in the best interests of the child, and not the settlement of the rights of two conflicting parties.[5]

Because custody actions adjudicate status, domicile of the child as well as his presence within the geographic bounds of the court's authority is essential to give jurisdiction in the majority of the states,[6] and this has generally been considered the rule in North Carolina.[7]

The minor cannot have domicile apart from that of his parent, guardian, or legal custodian. While living with his parents, the child's domicile is that of his father. Following the common law rule of the absolute authority of a father over his children, some states hold that upon separation of the parents the child's domicile continues to be that of his father until a custody award is made, even if the child lives with his mother. Other states allowing a married woman living apart from her husband separate domicile, and giving the parents equal rights to the child, hold that upon separation of the parents, the child takes the domicile of the parent with whom he lives.[8]

The domiciliary state is presumed to have the greatest interest in the welfare of its citizens and therefore to give the utmost deliberation to providing for its own incompetents. This forms a policy basis for the rule requiring domicile as well as physical presence to give a court jurisdiction in a custody case. Two well known authorities[9] set out domicile as a prerequisite to jurisdiction. The *Restatement*[10] supports the view that the child's domiciliary state has greater power than other states and thus may change a foreign custody award. But domicile of the child in the jurisdiction of the forum is not requisite for every purpose: "In any state into which the child comes, upon proof that the custodian is unfit to have control of the child, the child may be taken from him and given while in the state to another person. . . . This action will be effective within the state. If the state is also the domicile of the child, the action will change the status and will therefore be effective in every state."[11]

Another leading authority[12] has suggested that the welfare of the

[5] Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42, 56 (1940).

[6] 2 BEALE, CONFLICT OF LAWS § 144.3 (1935); 67 C. J. S., *Parent and Child* § 13 (1950).

[7] Richter v. Harmon, 243 N. C. 373, 90 S. E. 2d 744 (1955); Hoskins v. Currin, 242 N. C. 432, 88 S. E. 2d 288 (1955); Gafford v. Phelps, 235 N. C. 218, 29 S. E. 2d 313 (1952); Allman v. Register, 233 N. C. 531, 64 S. E. 2d 861 (1951).

[8] GOODRICH, CONFLICT OF LAWS §§ 36-40 (3d ed. 1949).

[9] *Ibid.*; Beale, *The Status of Children in the Conflict of Laws,* 1 U. CHI. L. REV. 13, 22 (1948), where this authority says: "Since custody of a child by one parent carries with it domicile and domestic status, jurisdiction to give the child to one parent or the other depends in principle on the domicile of the child."

[10] RESTATEMENT, CONFLICT OF LAWS § 145 (1934).

[11] *Id.* § 148.

[12] Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42, 62 (1940).

child being of foremost consideration, a legal technicality like domicile should not be made the basis for jurisdiction. Because a minor cannot establish domicile himself, it is felt that the rule fails if it is based on a greater interest of the domiciliary court. Fear is expressed that a child may suffer detriment at the hands of an undesirable custodian if the court of the residence state cannot take jurisdiction.

While both domicile and physical presence of the child within the state are required for jurisdiction in many states, a strong minority group holds that physical presence alone is a valid basis for determination of custody.[13] Justice Cardozo considered the latter the proper rule and gave voice to this view in *Finlay v. Finlay*.[14] Mere domicile of a child not in the state at the time of the action has been held a sufficient basis for custody action jurisdiction in one or two scattered cases,[15] but does not appear to be the consistent standard in any state. There are a few opinions which have intimated that the presence of both parents within the state would be reason enough for a court to entertain a custody action, and that neither the child's presence nor domicile would be necessary.[16]

The full faith and credit clause of the United States Constitution[17] is generally considered to prevent judgments and orders of the courts of the various states from overlapping,[18] yet the United States Supreme Court has given almost no indication as to how this clause should apply to custody cases. *Halvey v. Halvey*[19] was the last Supreme Court opinion on custody, and there the court based its decision on the narrow conflict of laws rule[20] that a Florida judgment was only entitled to such faith and credit by the New York court as Florida herself would give her custody order.[21] Many of the questionable areas were suggested

[13] Helton v. Crawley, 241 Iowa 296, 41 N. W. 2d 60 (1950); *In re* Bort, 25 Kan. 308 (1881); Rogers v. Daven, 298 Pa. 416, 148 Atl. 524 (1930).

[14] 240 N. Y. 429, 431, 148 N.E. 624, 625 (1925): "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection of the incompetent or helpless."

[15] Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P. 2d 739 (1948).

[16] Re Lee's Guardianship, 123 Cal. App. 2d 882, 267 P. 2d 847, 851 (1954) (dictum).

[17] U. S. CONST., art. IV, § 1.

[18] Harris v. Balk, 198 U. S. 215 (1905).

[19] 330 U. S. 610 (1947).

[20] In Halvey v. Halvey, 330 U. S. 610, 612 (1947) the court said that under FLA. STAT. ANN. § 65.14 (1941): ". . . decrees of Florida courts in divorce cases fixing custody of children are ordinarily not res judicata either in Florida or elsewhere, except as to the facts before the court at the time of the decree."

[21] In Halvey v. Halvey, *supra* note 20 at 614 the court cited REV. STAT. § 905 (1875), 28 U. S. C. § 1738 (1950) which "declared that judgments shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

by this case, but the court merely noted these issues and declined to consider them as essential to the determination of the case.[22]

The essential modifiability of the custody award is often given by the courts as the reason for not being bound to full faith.[23] A judgment, it is said, is not entitled to full faith and credit unless it is a final judgment.[24] An order is usually held to be binding and not subject to subsequent adjudication when a "full-dress-hearing" has been entertained in a court of competent jurisdiction and an award has been made on the issues before the court.[25] The best interests of a child, however, require that the custody award be redetermined upon show of subsequent change in circumstances rendering the former custodian incompetent.[26]

"Change of conditions" is so broad a standard as to place almost no restrictions upon the courts in treating foreign awards. Moreover, the United States Supreme Court in the *Halvey* case apparently did not feel that even evidence of such change was required for a redetermination of another state's award. In that case the father took the child from Florida to New York the day before the divorce decree and attendant award of custody to the mother was handed down. The mother promptly brought action in New York to recover the child. No finding of change of circumstances by the New York court was held necessary for it to make a different award of custody. Neither was the child's domicile made an issue in this case. Perhaps, then, Mr. Justice Brewer[27] was right when he said the temporary nature of a custody decree prevented it from being entitled to full faith and credit.[28]

[22] In a concurring opinion, Mr. Justice Rutledge suggests that once the child returned to Florida, the disappointed mother would be able to secure another decree nullifying that of the New York Court; that the father might then again abduct the child and secure restoration of those rights in New York, setting up "an unseemly litigious competition between the states and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters." Halvey v. Halvey, 330 U. S. 610, 620 (1947).

[23] See Boone v. Boone, 150 F. 2d 153, 156 (D. C. Cir. 1945).

[24] Sistare v. Sistare, 218 U. S. 1 (1909); Lynde v. Lynde, 181 U. S. 183 (1900).

[25] See Beale, *The Status of Children in the Conflict of Laws*, 1 U. CHI. L. REV. 13, 24 (1930): "When custody is awarded one parent by a court having jurisdiction, the right of this parent will be recognized by other states. The facts upon which the award was based have become res judicata and cannot be reexamined in the second state. But this estoppel extends only to conidtions which existed at the time of the original decree; the second court may examine any facts which have occurred since the original decree which throw light upon the fitness of the parents to have custody of the child."

[26] Rogers v. Daven, 298 Pa. 416, 441, 148 Alt. 524, 552 (1930).

[27] Mr. Justice David Josiah Brewer of the Kansas Supreme Court, later of United States Supreme Court.

[28] *In re* Bort, 25 Kan. 308 (1881). The subsequent post held by the Justice has been considered by some authorities to have given this case more recognition than it is due. See Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42, 58 (1940).

The fact that no uniform requirements exist to govern jurisdiction of custody matters practically amounts to "open season" for "child snatching." After an award of custody is made by a court of competent jurisdiction in State *A*, the disappointed parent or relative may without authority take the child from his custodian, carry him into State *B*, and have the child's custody redetermined in the courts of State *B*.[29] Similarly, this lack of harmony also puts a parent's custodianship in jeopardy if the child is allowed to visit the other parent or grandparents in a state other than that which awarded the custody.[30]

Two recent North Carolina cases, *Richter v. Harmon*[31] and *Weddington v. Weddington*,[32] bring these abuses sharply into focus. In the *Richter* Case, upon a divorce decree of the Florida court, the custody of a four year old girl was awarded to the child's mother. Sometime later, the mother notified the child's father, who was then living in North Carolina, that he could take the child for a visit to his home. In offering to allow the child to make the visit, the mother stipulated that the child was to be returned to her as soon as she could find employment and become settled in the Washington-Baltimore area. Later, upon the mother's demand, the father refused to relinquished the child. The mother then came to North Carolina and brought a special action[33] in the superior court to enforce the Florida custody award. That court held the foreign decree was entitled to full faith and credit, and ordered the father to surrender the little girl to her mother.

Upon appeal, the North Carolina Supreme Court held that the sister state's award was not entitled to such credit, and that the superior court should examine the circumstances of the case and determine into whose custody she should be placed. Apparently, the basis for the court's decision was the fact that the child's state of domicile which follows that of her legal custodian, the mother, had ceased to be Florida[34] and had become Maryland.[35] A point was made of the fact that a child usually must be domiciled in North Carolina for the court to assume jurisdiction in a custody proceeding.[36] Yet this child had never been

[29] Helton v. Crawley, 241 Iowa 296, 41 N. W. 2d 60 (1950); *Ex Parte* Heilman, 176 Kan. 5, 269 P. 2d 459 (1954); Commonwealth v. Schofield, 173 Pa. Super. 631, 98 A. 2d 437 (1953).

[30] Richer v. Harmon, 243 N. C. 373, 90 S. E. 2d 744 (1955); Goldsmith v. Salkey, 131 Tex. 139, 112 S. W. 2d 165 (1943).

[31] 243 N. C. 373, 90 S. E. 2d 744 (1955).

[32] 243 N. C. 702, 92 S. E. 2d 71 (1956).

[33] N. C. GEN. STAT. § 50-13 (1950).

[34] *In re* Alderman, 157 N. C. 507, 73 S. E. 126 (1911). This case has been cited often as authority for the proposition that a prior court's custody award has no binding force in a new state of domicile.

[35] *Cf.* Lorenz v. Royer, 194 Ore. 355, 360, 241 P. 2d 142, 148 (1952); *Re* Burns, 194 Wash. 293, 297, 77 P. 2d 1025, 1028 (1938).

[36] See Allman v. Register 233 N. C. 531, 533, 64 S. E. 2d 861, 862 (1951): "The validity of the [prior foreign] judgment . . . depends on whether the children

in her domiciliary state of Maryland and subject to the jurisdiction of its courts, and in addition both parents were before the North Carolina court; therefore, it was held proper that jurisdiction should be assumed and a redetermination of custody made. Thus by refusing to comply with the Florida court's order the father gained a redetermination of the child's custody.[37]

The *Weddington* Case is the most recent North Carolina decision involving "parental kidnapping." Here the superior court, in a habeas corpus action[38] brought upon separation, had awarded one of the two children to each parent with stipulations for visitations at given intervals. Later a divorce action was brought by the wife with no request for determination of custody. Then she sent the child over whom she had custody to visit the father. He did not return the child nor give any notice of her whereabouts from June until September. The mother located her child on a school yard in South Carolina and brought her back to North Carolina. She then moved the superior court for a de-determination of custody as part of the divorce action and the father was served with notice of this motion. Three days later he bodily picked the child up from her schoolroom and carried her back to South Carolina.[39]

The superior court again awarded the child to the mother and ordered that she be returned immediately under penalty of contempt proceedings. Upon appeal, the supreme court held that the lower court was without jurisdiction to determine custody as the child was not within the jurisdiction of the court.[40]

If such noncompliance and attendant abuses are not rebuffed in the subsequent custody actions,[41] is there not some legal recourse for this unsocial conduct? Contempt proceedings are available,[42] but if the

involved herein were domiciled in North Carolina at the time this proceeding was instituted. . . . [U]nless the children were domiciled in this state at such time, the court below was without jurisdiction to award their custody. . . ."

[37] Would it not have been a more orderly procedure for the court to uphold the lower court's order on domiciliary grounds, remanding the child to her mother? The father then could have petitioned the Maryland Court for a redetermination with the burden of proof of change of circumstances falling on him.

[38] N. C. GEN. STAT. § 17-39 (1953).

[39] *Quaere* what the South Carolina courts would have done if the action had been brought by the mother in that forum?

[40] The habeas corpus award was said to become ineffective upon the instigation of divorce proceedings thus rendering the action brought not one of enforcement of a previous custody order but an action for a new determination as part of the divorce action.

[41] See Commonwealth v. Schofield, 173 Pa. Super. 631, 645, 98 A. 2d 437, 443 (1953): "The fact that the mother took the children from Florida without the father's consent, and in violation of the decree of the Florida court is important here only so far as it may have a bearing upon her fitness to be awarded their custody."

[42] State v. Keller, 36 N. M. 81, 8 P. 2d 786 (1932).

abductor flees the state, as is most often the case, this action is of course ineffective. Kidnaping statutes of some states have been construed to allow a criminal action against the abducting parent or his agent.[43] Apparently, however, North Carolina's kidnaping laws have closed the door on this remedy.[44] Even where this action is available, when "border hopping" is practiced, difficulties of extradition proceedings render the law virtually unenforceable, especially where escape is made to a state not allowing such action. The federal statute on kidnaping[45] expressly excludes abduction by a parent.

At least one court[46] has awarded damages for mental disturbance to the parent or guardian from whom a child was illegally taken in a custody fight. Apparently, this action has not been often used, probably because many jurisdictions still adhere to the common law notion that a loss of services of a child must be proved before a parent is entitled to damages for the abduction of his child.[47]

With such meager remedies available, in the interest of the welfare of our children, the courts should refuse to entertain custody actions when a child's presence within the state is a result of wrongful conduct of one of the parties to the action.[48] The jurisdictional requirement of domicile of the child, in comparison with residence or presence alone, substantially reduces the benefits which are available to the abductor and withholder. The domicile rule is not suggested as a "cure-all" for custody abuses,[49] but until the United States Supreme Court speaks, or

[43] Lee v. People, 53 Colo. 507, 127 Pac. 1023 (1912); State v. Taylor, 125 Kan. 594, 264 Pac. 1090 (1928); Commonwealth v. Bresnahan, 255 Mass. 144, 150 N.E. 882 (1926); 31 AM. JUR., *Kidnapping* § 6 (1940); 51 C. J. S., *Kidnapping* § 4 (1947).

[44] N. C. GEN. STAT. §§ 14-40 and 42 (1952) provide that no near blood relative shall be indicted for abducting or conspiring to abduct a child.

[45] 62 STAT. 760 (1948), 18 U. S. C. § 1201 (1952), as amended, Pub. L. No. 983, 84th Cong., 2d Sess. S. (Aug. 6, 1956).

[46] Pickle v. Page, 252 N. Y. 474, 169 N. E. 650 (1930).

[47] *But see* Howell v. Howell, 162 N. C. 283, 78 S. E. 22 (1913), where the court held that in actions for abduction of infants no loss of service need be alleged or proved.

[48] See Shippin v. Bailey, 303 Ky. 10, 14, 196 S. W. 2d 425, 427 (1946) where the court said to adjudge custody would put the "stamp of judicial approval upon the wrongful taking." *Re* Burns, 194 Wash. 293, 77 P. 2d 1025 (1938) is an example of a case where the court refused to take jurisdiction when the child was wrongfully detained in the state. See Taylor v. Jeter, 33 Ga. 195, 203 (1862): "Shall the courts of Georgia avail themselves of a tort to wrest from those of a sister state a jurisdiction properly appertaining to them? We say not: rather let the subject be remanded to them."

[49] See *Ex Parte* Heilman, 176 Kan. 5, 269 P. 2d 459 (1954), where custody was awared the grandmother who abducted the child from California after the California court had awarded custody to the mother. The court considered substantial changes (*i.e.*, remarriage of the parents and subsequent reparting) before disposing of the prior Kansas award. Here both states seemed to claim the child as domiciliary. *Cf.* Evens v. Keller, 35 N. M. 659, 6 P. 2d 200 (1931). Neither would the domicile rule effect the abuses of the *Weddington* Case.

a conflict of laws rule evolves which shapes some jurisdictional contours out of the custody tangle, retention of this rule appears to be the most advisable course.

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Constitutional Law—The Right to Government Employment for Those Invoking the Fifth Amendment—Loyalty Oaths—Due Process

Slochower v. Board of Higher Education of New York City[1] again brought before the United States Supreme Court one of the most controversial issues that has confronted our courts in recent years—the right to continued government employment for those persons who have not been charged with or convicted of any crime,[2] but whose government service has been terminated[3] because of security or loyalty reasons. Specific examples have involved situations where: (a) the employee's loyalty was questionable,[4] (b) his status as a security risk made his retention incompatible with the best interests of national security,[5] (c)

[1] 350 U. S. 551 (1956).

[2] "The charge of disloyalty or even of being a security risk has become in the setting of today so serious that it is almost like a charge of a crime." Garrison, *Some Observations on the Loyalty-Security Program,* 23 U. CHI. L. REV. 1, 2 (1955).

[3] The cases before the Supreme Court on this point have challenged both state and federal laws. Although the principles involved are similar, the federal and state policies that have given rise to the cases have not been the same. The federal government has established an elaborate and expensive system for investigating its employees, for conducting loyalty and security hearings and for reviewing the results of these hearings. The states, if they have acted at all, have tended to confine their loyalty measures to less expensive and more easily administered programs. Generally, with reference to those categories listed in the text, those cases under a, b, and d have concerned federal employees and those under c and e have concerned state employees. Both the federal and state cases should be considered in a discussion pointed primarily at either line of decisions.

[4] Peters v. Hobby, 349 U. S. 331 (1955); Bailey v. Richardson, 341 U. S. 918, (1951).

[5] By virtue of Executive Order 10450 of April 27, 1953, the loyalty cases, which were formerly categorized separately from the security risk cases, are merged with and are known as security risks.

The criterion for dismissal as established under the first loyalty program was "on all the evidence, reasonable grounds exist for the belief that the person involved is disloyal." Executive Order 9835 of March 21, 1947. This criterion was changed to "reasonable doubt as to the loyalty of the person involved." Executive Order 10241 of April 28, 1951. Executive Order 10450 of April 27, 1953, made the criterion "whether the . . . retention . . . is clearly consistent with the interests of national security." This order provides standards and procedures for the exercise by agency heads of their power under the Summary Suspension Act, 64 STAT. 476, 1950, to summarily dismiss employees in the interests of national security and establishes the criterion for dismissal as stated above. "There has thus been a change from loyalty to security. At the present time, a person discharged as a security risk may well be able to establish his unswerving loyalty. . . . Loyalty cases as such no longer exist; a disloyal person is now dismissed as a security risk." Sweeney, *People, Government and Security: An Analysis of Three Books and a Program.* 51 NW. U. L. REV. 79, 81 (1956).

Executive Order 10450 was held invalid to the extent that it authorizes an em-